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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 679

UNITED STATES OF AMERICA, *Respondent,*

v.

WASHINGTON TOLL BRIDGE AUTHORITY, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS (NINTH CIRCUIT)

JOHN J. O'CONNELL,
Attorney General,

JOHN W. RILEY,
Special Assistant Attorney General,

Attorneys for Petitioner.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH., 1962

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WASHINGTON TOLL BRIDGE AUTHORITY, *Petitioner*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS (NINTH CIRCUIT)

The Washington Toll Bridge Authority, an agency and instrumentality of the State of Washington, hereby respectfully requests this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, concerning

(1) The Judgment of the United States Court of Appeals for the Ninth Circuit, dated July 31, 1962 (TR 161-171) (Petition for Rehearing denied on September 26, 1962: TR 203);

(2) The Order of the United States Court of Appeals for the Ninth Circuit dated September 26, 1962, denying Petitioner's Alternative Motion to Remand for Further Proceedings. (TR 203)

A.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW. (Rule 23-1(a))

(1) The Judgment of the United States Court of Appeals for the Ninth Circuit to which this Petition is directed is reported at 307 F. (2d) 330 (1962). (TR 161-171)

(Reproduced fully herein in *Appendix A.*)

(2) The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and the Petitioner's Alternative Motion for an Order to Remand for Further Proceedings was entered on September 26, 1962. (TR 203)

(Reproduced fully herein in *Appendix B.*)

(3) The Opinion of the United States District Court for the Western District of Washington, which was reversed by the United States Court of Appeals, is reported at 190 F. Supp. 95. (TR 27-32)

(Reproduced fully herein in *Appendix C.*)

(4) In addition to the foregoing opinions of the courts below which are pertinent to this Petition, *Appendix D* contains, for the convenience of the

Court, the prior opinion of the United States Court of Appeals for the Ninth Circuit reported at 281 Fed. 686, which was relied upon by the trial court (TR 27-32) but was specifically overruled by the United States Court of Appeals for the Ninth Circuit by its opinion of July 31, 1962 (TR 161-171) (Appendix A).

B.

JURISDICTION.

This action was commenced by the United States in the United States District Court for the Western District of Washington, Southern Division, pursuant to 26 USC 7401, 7402. (TR 3-27, incl.)

Judgment was entered by the District Court in favor of the Petitioner on February 16, 1961, together with Findings of Fact and Conclusions of Law (TR 32-45) in accordance with a detailed Memorandum Opinion of the trial court. (TR 27-32; reproduced in Appendix C.) On appeal to the Court of Appeals for the Ninth Circuit, the Judgment of the trial court was reversed in an opinion issued July 29, 1962. (TR 161-170; App. A)

A Petition for Rehearing (TR 172-181) and an Alternative Motion for an Order to Remand (TR 182-202) were timely filed by petitioner in the Court of Appeals and both were denied by an order of the Court of Appeals on September 26, 1962. (TR 183; Appendix B)

The jurisdiction of this Court is invoked by the petitioner in these proceedings pursuant to 28 USC 1254 (1) providing for the issuance of writs of certiorari in cases before the several United States Courts of Appeal after rendition of the judgment and decree of the Courts of Appeal of the United States.

C.

QUESTIONS PRESENTED.

The questions presented by this Petition for Writ of Certiorari are as follows:

(1) Whether the Federal Government may impose a tax which interferes with and substantially burdens a State in the performance of a governmental function.

(2) Whether or not the Congress intended that the federal transportation tax should apply to the tolls paid by users of a public highway system when using portions of such a state highway system consisting of a public-operated ferry system.

(3) Whether the United States Court of Appeals erred in refusing to enter an order remanding this case to the United States District Court for further proceedings so as to permit the State of Washington to prove the extent of the burden of the federal tax in question upon the exercise of the governmental duty, power and function of the State of Washing-

ton, and the extent of the resultant interference with the petitioner's governmental duty, power and function.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

(1) CONSTITUTIONAL PROVISIONS.

This case involves the constitutional principle that "* * * the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them * * * are exempt * * *" from taxation. (*Ohio v. Helvering*, 292 U. S. 360, 368.)

(2) STATUTORY PROVISIONS.

The portions of the Internal Revenue Code involved in this case ("The Federal Transportation Tax": 26 USC 4261 et seq) are set forth in Appendix E.

E.

STATEMENT OF THE CASE.

The petitioner is an agency and instrumentality of the State of Washington charged with the duty and authority to operate the "Washington State Ferries" as an integral part of the highway system of the State. (TR 27)

Since 1951 petitioner has operated an extensive ferry system on Puget Sound as part of the public highways of the State. (TR 27, 35, 36)

The ferry system in question is believed to be the largest of its kind in the United States. The necessity of the system is dictated by the geography of the area. The system provides vital links in the State's highway system connecting the State's highways and thereby avoiding circuitous land travel. (TR 37, 38)[1]

The trial court found that the operations of the ferries in question were in all respects identical to the operation and construction of toll bridges in the State of Washington. (F of F XV; TR 41) (In fact, a number of toll bridges have been constructed which replace routes formerly plied by ferries in petitioner's system.)[2]

> "By means of the ferries in question, the petitioner provides necessary public highways across the waters of the State of Washington." (F of F IX; TR 37-38)

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[1]This conclusion of the trial court affirmed by the Court of Appeals was restated on December 13, 1962, by the Washington Supreme Court in a decision upholding the constitutionality of legislation providing for the issuance of revenue bonds covering the Washington State Ferries and the Hood Canal Bridge backed up by a guaranty of gas tax funds. *State ex rel. Washington Toll Bridge Authority v. Yelle et al*, Cause No. 36240.

"Respondent urges as an additional objection that chapters 7 and 9, by authorizing a retention of a million dollars in the Puget Sound reserve account as a guaranty fund, violate the restriction in amendment 18 to the state constitution which requires all license fees and excise taxes derived from the sale of motor vehicle funds to be used exclusively for highway purposes.

"The Puget Sound ferry system and the Hood Canal bridge are both integral parts of the highway system. From what has been said, it is apparent that any loan from the Puget Sound reserve account will ultimately be repaid from tolls. Consequently, it is idle to say that the temporary employment of such funds to assist the development of the state highway system is within the diversion interdicted by the eighteenth amendment. The Puget Sound ferries operated by the state and the Hood Canal bridge are all indispensable links in the state highway system."

The trial court also found that the highway needs of the people of the State of Washington and the reasonable social and economic development of the State not only fully justify but require the nature and extent of the ferry system provided by petitioner. (F of F X, TR 38)

The acquisition and maintenance of Washington State Ferries has been financed by Public Revenue Bonds issued by petitioner. The costs of the operations of the system, and funds for retirement of such revenue bonds, are obtained from the system's revenue from *tolls* charged for use of its facilities, other income (payments from concessionaires) and other state tax funds.[3] (TR 37) (Appropriations by the legislature; funds from the

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[2] *State ex rel. Washington Toll Bridge Authority v. Yelle et al, supra*, described the situation as follows:

"The legislature has continuously considered toll bridges and ferries as a single operational unit for legislative purposes since 1949. Both form an integral part of the state highway system and cannot be regarded as separate subjects within Art. 2, § 19, of the state constitution." *Gross v. Washington State Ferries*, 159 Wash. Dec. 252, 367 P. (2d) 600; *Jeff Hunt Machinery Co. v. South Carolina State Highway Department*, 217 S. C. 423, 60 S. E. (2d) 859; *Deans v. County of Coconino*, 41 Ariz. 253, 17 P. (2d) 801; *Puget Sound Navigation Co. v. United States*, 107 F. (2d) 73; *Puget Sound Navigation Co. v. Department of Public Works*, 156 Wash. 377, 287 Pac. 52; *Savage Truck Line v. Commonwealth*, 193 Va. 237, 68 S. E. (2d) 510."

[3] In *State ex rel. Washington Toll Bridge Authority v. Yelle, supra*, the Washington Supreme Court discusses the integral relationship of ferries to the Washington Highway System in approving a single bond issue to refinance the Washington State Ferries and the Hood Canal Bridge.

It is a matter of common knowledge that the ferry system was purchased and the Hood Canal toll bridge was built with the proceeds of revenue bonds. *State ex rel. Washington Toll Bridge Authority v. Yelle*, 56 Wn. (2d) 86, 351 P. (2d) 493. It is, likewise, a matter of common knowledge that interest payments are frequently in jeopardy. With both the financial and judicial history of the problem freshly in mind, an informed legislature dealt with the problem in Laws of 1961, Ex. Ses., chapter 9, p. —, and endeavored to put the outstanding revenue bonds upon a sound financial basis by eliminating the possibility of default. There is such an intimate relationship

Governor's Emergency Fund; and certain other revolving funds financed by state gasoline taxes.) (See Appendix F.)

The Federal Government contends that the *tolls* charged by petitioner for use of the State Ferry System are subject to Federal transportation taxes. (TR 18-20) The assessments upon which the original complaint are based cover traffic from January 10, 1957 to September 30, 1957. (TR 40) Prior to these assessment periods, taxes were paid under protest for a while, then disputed and finally compromised pending settlement of this case. (TR 39)

Pursuant to a stipulation (TR 133) with the Federal Government, over a million dollars has been deposited with an escrow agent. Deposits to the fund ceased on November 15, 1962, in view of Public Law 87-508, June 28, 1962, which in effect repealed the Federal Transportation Tax except as to transportation by air. The funds on deposit will be distributed by the escrow agent upon final determination of this litigation.

After trial of the case before the United States District Court for the Western District of Washington, Judge Boldt reached the conclusion that "(1) the operation of the ferry system by petitioner was a governmental function, and as such was immune

between the public highways and the revenue bonds for both ferries and toll bridges that the refunding of such bonds is a single legislative purpose. The possible default of the revenue bonds of 1955 and 1957 was a matter of grave concern when the 1961 legislature convened in extraordinary session. It exercised an informed judgment that it would be in the public interest to consolidate them into a single refunded issue, which is authorized by chapter 9."

from federal taxation; (2) the statutes in question (26 USC 4261 et seq.: Appendix F) were never intended to apply to state operated ferry systems. * * *" (TR 42-43)

On appeal to the Court of Appeals for the Ninth Circuit, following hearings before a department of that court and then a rehearing en banc (TR 159), the judgment of the trial court was reversed. The opinion of the Court of Appeals (TR 161-171) to which this Petition is directed, concluded that:

(1) "* * * there is no constitutional immunity to collect and remit the taxes. * * *" (TR 167).

(2) The transportation tax *was* intended to apply to tolls collected by a state operated ferry system. (TR 168-169) However, since the petitioner is not "engaged in the business of transporting property for hire," the tax did not apply to those portions of the tolls representing charges for automobiles and trucks using the ferry system or other property moving over it. Accordingly, this case involves only the application of the Federal Transportation Tax to the tolls paid by individuals for passage over petitioner's facilities.

(3) The Court of Appeals also declared that

> "It is manifest that immunity of State activity here involved from the taxing power of the Federal Government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. Attention

must be focused on the specific activity and on the nature and extent of interference with, or burden upon, the state, and this interference or burden must be actual and substantial, and not the creature of speculation and conjecture.

"Applying these teachings to the instant case, it is difficult to understand how the present tax unduly interferes with the State of Washington's function of government. The record is void of any tangible evidence to this effect." (TR 166)

Petitioner timely petitioned the Court of Appeals for a rehearing of the matter. (TR 172-181) Simultaneously, petitioner filed its Alternative Motion for an Order to Remand, etc. (TR 182-202). Petitioner sought procedural relief in order to show "* * * how the tax unduly interferes with the State of Washington's function of government," and that the effect of the tolls was "actual and substantial." (In accordance with the newly announced rule of the Court of Appeals. TR 166)

Affidavits in support of petitioner's Alternative Motion to Remand show that during the course of these proceedings, the petitioner's financial condition has steadily deteriorated and that the taxes in this case will of necessity be paid to the Federal Government from state tax sources other than revenue from the tolls paid to petitioner by users of the petitioner's ferry facilities. (TR 182-202) (See Appendix F.) (Actually, it was and is petitioner's contention that affidavits in support of the motion were unnecessary

because (a) the trial court specifically found that the petitioner's operations are supported in part by direct appropriation of taxes (TR 37), and (b) the Court of Appeals could have taken judicial notice of the Washington statutes referred to in the affidavits filed in support of the Motion for an Order to Remand.)

The Court of Appeals denied the petitioner's Motion and its Petition for Rehearing on September 26, 1962. This Petition was timely filed accordingly.

F.

REASONS JUSTIFYING REVIEW OF THIS CASE. (Rule 19-1 (b))

Petitioner respectfully submits that a Writ of Certiorari should be granted in this case because:

(1) The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, But Should Be, Decided By This Court.

(2) The Court of Appeals Has Decided an Important Question of Statutory Construction of Federal Law Which Has Not Been, But Should Be, Decided By This Court.

(3) The Court of Appeals Has Decided an Important Federal Question in Conflict With Applicable Decisions of This Court.

(4) The Opinions of This Court in *Ohio v. Helvering*, 292 U. S. 360, and *New York v. United States*, 326 U. S. 572, Should Be Reviewed and Reconciled.

(5) The Decision of the Court of Appeals (Ninth Circuit) Is in Conflict With Decisions of Other Courts of Appeal.

(6) The Lower Court Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

G.

DISCUSSION AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT. Rule 23-1 (h))

(1) The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, But Should Be, Decided by This Court.

The constitutional question precipitated by this case concerns the division of governmental powers between the National and State governments.

The case does not involve the undoubted supremacy of the National government in matters of sovereign power or powers essential to the existence of the Federal government. Rather, we are concerned here with the difficult problem described by Professor Willoughby as follows:

> "The maintenance of this (federal) supremacy unimpaired, while at the same time preserving to the states their proper autonomy and independence of action, has, however, been a difficult task; and so long as the Federal form is retained, this task will continue to tax, to the utmost, the legal and political abilities of our courts and political bodies." 1 *Willoughby*

on the Constitution of the United States, 2d ed., 130.

The lower court described the prior state of this area of constitutional law as follows:

> "It was recognized at the time of King County (*United States v. King County*, 282 U. S. 676 (1922); Appendix D) as it is now, that the control over, and the operation of, ferries is historically a governmental function. It was thought at the time of such decision and for some years thereafter, in order to preserve the independence of the state, that the Federal Government could not constitutionally impose a tax on state activities determined to be governmental in character as opposed to activities determined to be proprietary." *United States v. Washington Toll Bridge Authority*, 307 F. (2d) 330, 333. (TR 164)

The court then advanced into the trouble zone as follows:

> "In more recent years, however, this distinction has been recognized as an unsatisfactory and inconclusive guide for determining the immunity of a state activity from the federal taxing power." *U. S. v. Washington TBA, supra*, 333. (TR 164)

This proposition as applied to the facts of this case represents a new and important proposition which has not been, but should be, decided by this Court. It constituted the basis for determination by the Court of Appeals that the Federal Transportation Tax was applicable to tolls collected by the pe-

titioner in exercise of the governmental function involved in this case.

The foregoing challenged conclusion of the Court of Appeals purports to rest upon this Court's decisions in *Helvering v. Gerhardt*, 304 U. S. 405 (1938), and *New York v. United States*, 326 U. S. 572 (1946).

In *Helvering v. Gerhardt, supra*, the question was whether the imposition of the Federal Income Tax upon salaries of state employees placed an unconstitutional burden upon the Port of New York authority. The petitioner has no quarrel with *Helvering v. Gerhardt*. But petitioner challenges the applicability of the rule of that case to this one.

In *New York v. United States*, the question was whether a federal excise tax on carbonated beverages could be collected on the sale, by New York, of Saratoga Springs Mineral Water. This Court was sharply divided. The leading opinion was signed by Justices Frankfurter and Rutledge. A separate concurring opinion was issued by Chief Justice Stone and Justices Reid, Murphy and Burton, while Justices Black and Douglas dissented vigorously.

Petitioner accepts the holding of *New York* arguendo. But, it is respectfully submitted that the extension of the Frankfurter-Rutledge opinion to the facts of this case is a far-reaching and all-encompassing holding of manifest significance which should be reviewed by this Court.

Throughout the history of this Court, the states

have been assured that " * * * the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them * * * are exempt." *Ohio v. Helvering*, 292 U. S. 360, *supra*. If the lower court's opinion stands, it is clear that that assurance to the states has been nullified.

The question presented to the Court of Appeals in this case was brought into even sharper focus by petitioner's Motion for an Order to Remand (TR 182-202) (Appendix F) for further proceedings for the purpose of illustrating that the burden of the taxes involved here was "actual and substantial." In denying this Motion after having reaffirmed that the function of the State of Washington in this case is "governmental," the Court of Appeals has decided that no matter how "actual and substantial" the resultant burden and interference on the State's governmental function may be, there is *no* constitutional restriction on the power of the Federal Government to impose taxes on a state. The question thus presented to this Court is:

> *Can the Federal Government impose a tax which interferes with and substantially burdens the State's performance of a governmental function?*

None of the decisions of this Court heretofore cited and relied upon by respondent decide this important question in favor of the Federal Government.

Wilmette Park District v. Campbell, 330 US 471 (1949), and *Allen v. Regents of the University*

System of Georgia, 304 US 439 (1938), each involve the Federal Admissions Tax. *Ohio v. Helvering*, *supra*, approved collection of the federal liquor excise tax imposed on alcoholic beverages dispensed in liquor stores operated by Ohio.*

Respondent may argue that the tax is not "direct". But if certiorari is granted, petitioner will argue that the Federal tax in this case is just as direct and certain an interference with the performance of a governmental function as if the tax were imposed on each issue of revenue bonds issued by the petitioner to capitalize the establishment of the ferry system itself. Such interference by the Federal Government is unnecessary to preserve Federal supremacy and is unconstitutional.

(2) THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION OF A FEDERAL STATUTE WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Petitioner will argue, in support of the Judgment of the trial court, that the legislative environment of the statutes in question (Appendix E) clearly indicates that the Congress never intended

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*Arguendo, petitioner will concede that a federal tax (i.e., a liquor excise tax, or a federal admissions tax) may apply to products and amusements dispensed by a state in the carrying out of its governmental functions (policing of the distribution of alcoholic beverages in the liquor tax situation. *Ohio v. Helvering*, 292 US 360; sale of mineral waters, *New York v. United States*, 326 US 572; or public education and health in the admissions tax situation; *Wilmette Park District v. Campbell*, 338 US 411; *Allen v. Regents*, 304 US 439).

Several essential characteristics and qualifications obviously distinguish those cases from this one: (1) The State can police the sale of alcoholic beverages or engage in public education without engaging in competition with private enterprise; (2) a tax paid by the purchasers of alcohol or athletic admissions tickets or mineral water *does not* deprive the states of revenue or otherwise inter-

that the Federal Transportation Tax should apply to tolls paid to a state government in operating a state ferry system which is a part of the state public highway system. No other federal court has construed the statute in question as the Court of Appeals in this case. Indeed, petitioner contends that the decision in question is in conflict with a recent decision of the Court of Appeals for the Fifth Circuit. Consequently the State of Washington is, so far as we know, the only state to suffer assessments for taxes of the kind in question.

The statutes in question were substantially repealed by amendments in the last Congress. Nevertheless, the amount of tax which is involved, the

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fere with or place a burden upon the exercise of the state's police power or any other governmental function. Furthermore, the sale of liquor, mineral water and dispensation of amusement are not traditional governmental functions.

TOLLS are as much a "means" of conducting government as TAXES, per se. In *State ex rel. Washington Toll Bridge Authority v. Yelle, et al, supra*, the Washington Supreme Court in discussing § 4, chapter 121 of the Laws of 1951 (Washington) providing for pledges of tax funds as guaranties of anticipated toll bridge revenue bonds stated:

"What justified such a provision in that statute and the provision of similar import in the statutes now before us is that the people of this state—conceiving that excise taxes on the sale, distribution, and use of motor vehicle fuels were, in a very real sense, tolls for the use of the highways—provided, by a constitutional amendment, that such excise taxes should be paid into a special fund for highway purposes only; and, since the state can issue bonds for highway purposes payable from that special fund, the implication is that it can covenant that the excise taxes directed by the constitutional amendment to be paid into the fund will be adequate for the payment and servicing of the bonds."

In *United States v. State Road Department of Florida*, 255 F. (2d) 516 (5th Cir, 1958), the Court considered only taxes applied to tolls for passage of automobiles over a single ferry operated by Florida as a link of its highway system. The Court concluded that the tax was not intended to apply to the tolls there involved. The Court of Appeals for the Ninth Circuit follows the Fifth Circuit to the extent that the tax does not apply to automobiles or other property passing over Washington ferries, but it does apply to the drivers of cars and other passengers.

deposit of funds in escrow pending final settlement (TR 133 et seq), and the relationship of this question of statutory interpretation to the substantial and important question of constitutional law are such that both questions should be decided by this Court.

(3) THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner has shown that no prior decision of this Court permits the Federal Government to impose a tax which actually and substantially interferes with or burdens a state's function of government. Consequently, the decision of the Circuit Court permitting assessments for such a tax is an unprecedented decision which has not been, but should be, decided by this Court.

On the other hand, in several decisions by this Court sustaining various federal taxes in situations involving activities other than customary or traditional "governmental" activities, this Court has given recognition to the right of state government to carry out governmental functions without interference or burden from federal taxes.

Ohio v. Helvering, 292 US 360

Wilmette Park District v. United States, 338 US 411

United States v. California, 297 US 175

That a state may not, in the exercise of its powers, interfere with an agency of the Federal

Government was settled once and for all by the decision of this Court in *McCulloch v. Maryland*, 4 Wheat 316.

And at least until recently, it was recognized that this Court required some degree of reciprocity from the Federal Government with respect to the states and their agencies; provided, of course, that only governmental activities may be exempted. 1 *Willoughby on the Constitution of the United States*, 2nd edition, p. 165.

This case calls into question whether there is really any reciprocity in this area of constitutional law at all. Petitioner submits that certiorari is warranted accordingly.

(4) OHIO V. HELVERING, SUPRA, AND NEW YORK V. UNITED STATES, SUPRA SHOULD BE RECONCILED.

In *Ohio v. Helvering*, *supra*, this Court declared that the governmental functions of a state are exempt from the interference of federal taxes. But a divided court in *New York v. U. S.*, *supra*, suggests (without deciding definitely) that the traditional line of governmental versus proprietary functions of state government is no longer useful in determining the validity of federal taxes applied to activities of state governments.

In *New York v. United States*, *supra*, three different opinions were issued as to whether or not mineral waters bottled by New York State should be subject to a federal excise tax. Petitioner has no

quarrel with the result reached here, but we challenge here the application of the leading two judges' opinion to the facts of this case. We submit, also, that the language in *New York v. United States* which was relied on by the Circuit Court, in rendering the decision challenged here, is fundamentally inconsistent with other decisions of this court, if not also inconsistent with the theory and purpose of *New York v. United States* itself.

The proposition stated by Frankfurter and Rutledge is inconsistent with this Court's holding in *Ohio v. Helvering, supra.* Furthermore, in the concurring opinion in *New York v. United States, supra,* Chief Justice Stone and Justices Reid, Murphy and Burton held that:

> "* * * only when and because the subject of taxation is state property or a state activity is it necessary to consider whether the tax even though non-discriminatory, unduly interferes with the performance of the state's function of government. If it does, then the fact that the tax is non-discriminatory does not save it. * * * It is plain that the invalidity is due wholly to the fact that it is a state which is being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the constitution recognizes as sovereign." *New York v. United States, supra,* 90 L ed at 337.

In the case at bar, we submit that the subject of tax is a "state activity" which is purely govern-

mental. Therefore, at least the rule of the concurring opinion of Justices Stone, Reid, Murphy and Burton would permit petitioner to establish the extent of interference with the performance of the State's function of government. Petitioner draws the same conclusion from *Ohio v. Helvering, supra.* But the leading opinion of *New York* suggests a contrary conclusion and the Court of Appeals followed that suggestion.

In either event, the two opinions of *New York v. United States* are inconsistent with each other, not to mention the vigorous dissents of Justices Black and Douglas and the unanimous opinion of this Court in *Ohio v. Helvering.*

We suspect that the factual situation presented by this case is exactly the situation which Justices Douglas and Black had in mind when they dissented in *New York v. United States.*

This petition, *therefore,* affords the Court an opportunity to clarify this problem area, i.e., the relationship of the states to the Federal Government in these circumstances, and to harmonize the decisions of this Court in *Ohio v. Helvering* and *New York v. United States.*

(5) THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

As indicated earlier, the lower court reversed its own earlier decision that a tax exactly like that involved here, results in an unconstitutional inter-

ference with and burden upon state government. (*United States v. King County*, 281 Fed 686 (1922))

The *King County* case was cited with approval by the Court of Appeals for the Fifth Circuit (*United States v. The State Road Department of Florida*, 255 F (2d) 516 (1958)). In the Florida case the Federal Transportation Tax involved only a tax on tolls for passage of automobiles (as "property"; 42 USC 4271 et seq).

The Court (Fifth Circuit) concluded that Congress never intended to impose the tax in such situations because the state could not be said to be a "person engaged in the business of transporting property for hire". (42 USC 4271 et seq).

The Ninth Circuit purported to follow the Fifth Circuit to this extent. So the tax in this case applies to a driver of a car and other "passengers" but not to the automobile he drove, during the periods that the tax on transportation of property was in effect.

Even though the Fifth Circuit had thus disposed of its problem, it indicated quite clearly that the tax would have been unconstitutional if it had been applicable to the tolls charged by the State for use of the highway facility involved there.

In *Jamestown Newport Ferry Co. v. Commissioner of Internal Revenue*, 41 F (2d) 920 taxes assessed against income from tolls collected in maintaining ferries and highways were stricken by the

Court of Appeals (Second Circuit). That decision holds that taxes cannot be assessed upon a state's income from such governmental activities.

It is respectfully submitted, that to have permitted an income tax in *Jamestown v. Newport Ferry Co., supra*, would have been less onerous than the tax here. Presumably, the Federal Government would not have collected a tax unless the Jamestown Newport Ferry had shown some net income after allowance for depreciation, overhead, etc.

(6) THE LOWER COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The crux of the lower court's opinion is that

> "* * * Immunity of State activity * * * from the taxing power of the Federal Government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. *Attention must be focused on the specific activity and on the nature and extent of interference with, and burden upon, the state; and this interference or burden must be actual and substantial.*
>
> "Applying these testings to this instant case, it is difficult to understand how the present tax unduly *interferes with the State of Washington's function of government. The record is void of any tangible evidence to this effect.*" (U. S. v. T. B. A., supra, Tr. 166)

It is true that no evidence was offered to show the severe effect that a 10% tax on tolls would have

and has had upon the exercise of the State of Washington's function of government in this case.

The principal reason is simply that no such showing was required under *United States v. King County*, 281 Fed 686 (CAA 9, 1922). (See Appendix D). The holding of *King County* was absolutely dispositive of the law of this case until the lower court specifically reversed itself by the opinion to which this Petition is directed.

Although petitioner disagreed with the lower court, petitioner requested the Court of Appeals to remand the case (TR 182-202) in order to establish what the Court itself had just declared was esesntial, to-wit:

> (1) "* * * the nature and extent of interference with or burden upon the state * * *"
>
> (2) and that the burden of the taxes was and is "* * * actual and substantial * * *"

The petitioner's Motion for an Order to Remand was supported by affidavits indicating the nature of the facts which support these conclusions. (TR 182-202)

Nevertheless the petitioner's Motion was denied by the Court of Appeals. (TR 203, Appendix B.). This procedural error is, we submit, a clear case of departure from the usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

Petitioner's Motion for an Order to Remand the case to the trial court for further proceedings, although unusual, only asked the Court of Appeals to exercise in a very conservative way, the liberal powers vested in the federal courts. The action which the Court of Appeals could have taken may be compared to *Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co.*, 49 F (2d) 73, 75-66 (CCA-6th, 1930). (Cf 6 Bender, *Federal Practice Manual* 3863.)

The procedure contemplated by petitioner's Motion for an Order to Remand, etc., is clearly proper according to 28 USC 2106, providing:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."

Likewise, an order by the Court of Appeals pursuant to 28 USC 2106 would have been proper and is indicated by the facts of this case.

If certiorari is granted, petitioner will argue that at the least an order should be entered in favor of petitioner pursuant to the authority vested in this Court which will permit petitioner on remand to show that the burden and interference of the tax in question is actual and so substantial as to un-

constitutionally interrupt the division of governmental powers now in balance between the State and Federal governments.

WHEREFORE, the petitioner prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals, Ninth Circuit, for the purpose of considering the questions discussed in the foregoing Petition.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,
State of Washington,
Temple of Justice,
Olympia, Washington,

JOHN W. RILEY,
Special Assistant Attorney General,
535 Central Building,
Seattle, Washington,

Attorneys for Petitioner.

Dated at Olympia, Washington,
this 19th day of December, 1962.

SCHEDULE OF APPENDIXES

Appendix A: Decision of U. S. Court of Appeals (9th Cir.) (307 F. (2d) 330 (1962)) Reversing 190 F. Supp. 95.

Appendix B: Order of U. S. Court of Appeals (9th Cir.) Denying Petition for Rehearing and Denying Motion for Order to Remand (Sept. 26, 1962).

Appendix C: Decision of United States District Court in and for the Western District of Washington, Southern Division (190 F. Supp. 95 (1960)).

Appendix D: Decision of the United States Court of Appeals (9th Cir.) (281 F. 686 (1922)).

Appendix E: Text of Federal Statutes Involved in These Proceedings.

Appendix F: Petitioner's Alternative Motion before the U. S. Court of Appeals for Order to Remand, etc.

APPENDIX A
(307 F (2d) 330)

UNITED STATES OF AMERICA Appellant,

v.

WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a Washington State Ferries, Appellee.

No. 17379.

United States Court of Appeals, Ninth Circuit.
July 31, 1962.

Rehearing Denied Sept. 26, 1962.

Louis F. Oberdorfer, Asst. Atty. Gen., Lee A. Jackson, Melva M. Graney, and Joseph Kovner, Attys., Tax Division, Dept. of Justice, Washington, D. C., Brockman Adams, U. S. Atty., Seattle, Wash., and C. W. Billinghurst, Asst. U. S. Atty., Tacoma, Wash., for appellant.

John J. O'Connell, Atty. Gen., for State of Washington, and John W. Riley, Deputy Atty. Gen., for State of Washington, Olympia, Wash., for appellee.

George N. Hayes, Atty. Gen., for State of Alaska, and Michael M. Holmes, Asst. Atty. Gen., State of Alaska, Juneau, Alaska, and appearing for State of Alaska as amicus curiae.

Before CHAMBERS, BARNES, HAMLEY, HAMLIN, JERTBERG, MERRILL, KOELSCH, BROWNING and DUNIWAY, Circuit Judges.

JERTBERG, Circuit Judge.

This case draws in issue the constitutional and statutory application of the federal transportation excise taxes to the fares paid for the transportation of persons and property on vessels operated by appellee, W hington Toll Bridge Authority, d/b/a Washir on State Ferries.

Specifically, appellant, the United States, instituted an action in the court below to recover unpaid federal transportation excise taxes assessed against the appellee for the first three quarters of 1957. The District Court denied recovery. Its opinion is reported at 190 F. Supp. 95. The jurisdiction of the District Court is founded on § 7402(a) of the Internal Revenue Code of 1954. The jurisdiction of this Court rests on Title 28 U.S.C.A. §§ 1291-4.

The Washington Toll Bridge Authority was established, and its powers and duties prescribed, by the laws of 1937, Chapt. 173, p. 654.[1] It is an instrumentality of the State of Washington and exists, for the most part, as a self-supporting entity with all of the rights and liabilities of a common carrier. Since 1951, it has operated an extensive ferry system on the Puget Sound and its tributaries between local and international points. This system is perhaps the largest of its kind in the United States. Its necessity is dictated by the geography of the area and it provides a vital link in the State's highway system, carrying passengers and property over various

[1] The enabling Act may be found in Washington Revised Code, Section 47.60 et seq.

bodies of water to connect the State highways and thereby avoiding circuitous land travel. The ferry system operated by the Authority is an expansion of services formerly provided, in part, by King County, State of Washington, a municipal corporation, and its successor, King County Ferry District No. 1, and, in greater part, by the Puget Sound Navigation Company, a private corporation.

Since the commencement of the Authority's ferry operations, the United States has pursued it for taxes imposed by §§ 4261, 4271 and 4291, Title 26 U.S.C.A. of the Internal Revenue Code of 1954.[2]

---

[2]The pertinent provisions of these Sections are as follows:

"§ 4261. **Imposition of tax**

"(a) Amounts paid within the United States—There is hereby imposed upon the amount paid within the United States for taxable transportation (as defined in section 4262) of any person by rail, motor vehicle, water, or air a tax equal to—

* * *

* * * * * * *

"(d) **By whom paid.**—Except as provided in section 4262, the taxes imposed by this section shall be paid by the person making the payment subject to the tax."

"§ 4271. **Imposition of tax**

"(a) Property other than coal.—There is hereby imposed upon the amount paid within or without the United States for the transportation of property, except coal, by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per cent of the amount so paid.

* * * * *

"(d) **By whom paid.**—The taxes imposed by this section shall be paid by the person making the payment subject to the tax."

"§ 4291. **Cases where persons receiving payments must collect tax**

"Except as otherwise provided in sections 4231 and 4264(a), every person receiving any payment for facilities or service on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment. * * *"

These provisions are comprehensive in application. They impose a tax upon the "amount paid" for the transportation of persons or property "by water" and other means. The tax is made payable by the person paying for the transportation and the person receiving the payment is obligated to collect the tax. From June 1951 until April 1, 1952, the Authority collected and paid similar taxes under protest. Thereafter, it entered into extended negotiations with the Commissioner of Internal Revenue which culminated in an agreement whereby past claims were compromised. In order to adjudicate the question the Authority agreed to raise its fares in an amount equal to the tax and to place the amount in escrow and, in turn, the Commissioner agreed to promptly initiate litigation. Pursuant to this agreement an amount equal to the tax was collected by the Authority for the first three quarters of 1957 and placed in escrow. The United States made its assessment and filed suit.

The findings of fact by the District Court are based upon a stipulation with exhibits and the testimony of Darrell Hedges, executive secretary of the Authority. These findings are not strenuously disputed and are substantially, though more detailed, the same as heretofore recited. The District Court, following a previous decision of this Court, infra, reached the conclusion that the operation of the ferry system by the Authority was a governmental function and, as such, was immune from federal taxation. In addition, the District Court held that

these tax provisions were not intended by Congress to apply to state-operated ferry systems. The correctness of these conclusions of law are the primary concern of this appeal.

In United States v. King County, 281 F. 686 (9th Cir. 1922), this Court held that the ferry system operated by King County was immune from a federal tax of the type here involved because it was "an interference with and a burden upon the governmental functions of the state."[3]

Contrary to the assertion of appellant that the Washington Toll Bridge authority exists as a "separate entity," specially created by the State of Washington rather than as an "agency" of the State in the full sense of that term, we shall consider the questions involved in this appeal on the basis of the District Court's conclusion that the Authority is an instrumentality of the State of Washington authorized to operate the ferry system as an integral part of the highway system of the States.

It was recognized at the time of the decision in King County, as it is now, that the control over,

[3]After holding that the operation of a ferry was strictly a governmental function, the Court said, at p. 690;

> "'It is true that in the [instant] case the tax was not imposed directly upon the county of King, but upon the persons paying to it the transportation charges; but it is obvious that the collection of those charges is at least one of the means which the county must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state."

and the operation of, ferries is historically a governmental function. It was thought at the time of such decision and for some years thereafter in order to preserve the independence of the State, that the federal government could not constitutionally impose a tax on State activities determined to be governmental in character as opposed to activities determined to be proprietary. In more recent years, however, this distinction has been recognized as an unsatisfactory and inconclusive guide for determining the immunity of a State activity from the federal taxing power. In Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938), the question for decision was whether the imposition of a federal income tax on salaries received by employees of the Port of New York Authority placed an unconstitutional burden on the States of New York and New Jersey. The Port Authority is a bi-state corporation created by compact between New York and New Jersey and approved by the Congress of the United States. The Authority constructed vehicular bridges over waters of New York Harbor or adjacent to it, and vehicular tunnels under the Hudson River. The Authority collected tolls from the users of such facilities. It is obvious that the bridges and tunnels formed a part of the highway systems of the two States and that the construction and operation of the same was a governmental function. It was contended that the imposition of a federal income tax on the salaries paid to employees of the Authority

constituted an interference with and a burden upon the States in the performance of a governmental function. This contention was rejected by the Supreme Court in sustaining the imposition of the tax. In the course of its opinion, the Court stated (at pp. 419-420, 58 S. Ct. at p. 975) that prior judicial pronouncements of that Court establish

> "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. * * * The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons."

Further, in the course of its opinion, the Court stated, at p. 422, 58 S. Ct. at p. 976:

> "* * * The state and national governments must co-exist. Each must be supported

by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power."

In New York v. United States, 326 U. S. 572, 66 S. Ct. 310, 90 L. Ed. 326 (1946), the Supreme Court held that the State of New York was not immune from the tax imposed by § 615 of the Revenue Act of 1932 on the sale of mineral waters taken from Saratoga Springs owned and operated by the State. The State of New York contended that it was immune from the tax because it was engaged in the disposition of its natural resources and that such activity was governmental in character. While it can be reasonably asserted that in the sale of mineral waters the State was engaging in a proprietary instead of a governmental function, the Court took occasion to state (at p. 580, 66 S. Ct. at p. 313), as follows:

"* * * To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate

manifestations of indivisible governmental powers."

In concluding its opinion, the Court stated, at p. 583, 66 S. Ct. at p. 314:

> "* * * * So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter."

[1, 2] From the teachings of the above cited cases[1] it is manifest that immunity of the State activity here involved from the taxing power of the federal government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. Attention must be focused on the specific activity and on the nature and extent of interference with, or burden upon, the State, and this interference or burden must be "actual and substantial," and not the creature of speculation and conjecture.

Applying these teachings to the instant case, it is difficult to understand how the present tax unduly interferes with the State of Washington's function

[1] See also Wilmette Park Dist. v. Campbell, 338 U. S. 441, 70 S. Ct. 195, 94 L. Ed. 205 (1949) and Allen v. Regents of The University System of Georgia, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448 (1938).

of government. The record is void of any tangible evidence to this effect. The tax involved is made payable by the persons who pay for the transportation while the State's only obligation is to collect the tax. Since the King County case, the States have been forced to accept the role of tax collector for the federal government on numerous occasions, e. g., income and admission taxes. See Commonwealth of Massachusetts v. United States, 296 F. 2d 336 (1st Cir. 1961). Such collections have not unduly interfered with, or placed a burden upon, the states' function of government. And because the tax is absorbed by the persons using the ferry system, it imposes no undue economic burden upon the State of Washington. Any indirect economic consequences incident to such a tax, such as a decrease in the volume of business if the toll is raised or absorption by the State if it is not, are speculative in nature, not "actual or substantial." Here the Authority raised its toll in an amount equal to the tax and there is no claim that this has affected the operation of its ferry system in any manner. Consequently, we hold that the Authority is not constitutionally immune from the duty to collect and to remit to the United States Government the federal excise taxes on transportation here involved. This holding requires us to, and we do, overrule the earlier holding of this Court in the King County case.

[3] Having concluded that no immunity from the duty to collect and remit the taxes exists, the

next question is whether Congress intended them to apply to a State-operated ferry system. For this purpose the provisions concerning the tax on persons and property will be considered separately. Section 4271 imposes the tax upon the "amount paid" for the transportation of property "by water" and other means. It is imposed on the person paying for said transportation. Section 4272(a) discloses that this tax does not apply to amounts paid to a person who is not "engaged in the business of transporting property for hire."[5] These Sections were construed in United States v. State Road Department of Florida, 255 F. 2d 516 (5th Cir. 1958). There the Court recognized the power of Congress to tax non-discriminatorily activities of a State and, conversely, to exempt a State from such a tax. It held that the exemption in § 4272(a) applied to a State-operated ferry system because it was not "engaged in the business of transporting property for hire."[6] In view

[5]This exemption in § 4272 reads as follows:

"(a) Not in business for hire.—The tax imposed under section 4271 shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under such section."

[6]The Court's opinion reads (at p. 518) as follows:

"In light of the present day state of the cases; we do not doubt the power of Congress to tax non-discriminatorily many activities in which a state may engage. It is equally clear, however, that Congress can exempt the state from the burden of taxes that otherwise fall uniformly on others. Construing the language of this exemption section as best we can, we conclude that Congress recognized that there would be persons or entities

of the historical nature of a State-operated or controlled ferry system and its function as a link in a highway system, this Court agrees with the holding of the Court of Appeals for the Fifth Circuit, construing § 4272(a) as exempting the tax otherwise made payable under § 4271 for the transportation of property.[7]

Section 4261 imposes the tax on persons. It is likewise made payable by the person paying for the transportation. However, this provision has no exemption equivalent to § 4272(a) where payments are made to persons not engaged in the business of transporting for hire. Nor do any of the exemptions for the tax imposed on persons, as specified in § 4263, apply here.[8] Hence, neither § 4272(a) nor the State Road Department of Florida case is authority for reasoning that the tax on persons is not applicable to State-operated ferry systems. Congress must have intended to, and did, treat the tax on persons and property differently, enacting statutes broad in scope to encompass the subject matter here involved, but exempting therefrom the tax on property and not the tax on persons.

It may be argued that only "persons" receiving

---

that charged for transportation of property not 'engaged in the business of transporting property for hire.' Otherwise there would be no need for Section 4272 at all. We think the State Road Department is such an entity."

[7] §§ 4271 and 4272 were repealed by § 4 of the Tax Rate Extension Act of 1958, P.L. 85—475, 72 Stat. 260.

[8] The exemptions specified in § 4263 include commutation travel, small vehicles and aircraft on nonestablished lines, fishing trips, certain organizations, and members of the armed forces.

the payments are obligated to collect the tax under § 4291 and that a State is not such a person. However, a State has been considered a person under comparable statutes.[9] Any other construction of the word "person" would be unreasonable once it is determined that the tax sought to be collected applies and is within the constitutional power of Congress to impose. The Authority's argument that a state is not such a "person" is untenable and assumes a factual situation not disclosed by the record. This Court concludes that §§ 4261 and 4291 require passengers of the ferry system to pay the tax and the Authority to collect it and pay it over to the United States.

[4, 5] We find no merit in the Authority's contention that the decision of this Court in the King County case is *res judicata* in this case. This defense is inapplicable for the reasons that a different tax year is involved, a different statute is involved, and different parties are involved. Similarly, the doctrine of collateral estoppel is inapplicable. As stated in Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, at p. 599, 68 S. Ct. 715, 92 L. Ed. 898 (1948):

> "* * * That principle [collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static,

[9] Sims v. United States, 359 U. S. 108, 79 S. Ct. 641, 3 L. Ed. 667 (1959); Wilmette Park Dist. v. Campbell, 338 U. S. 411, 70 S. Ct. 195 (1949); Commonwealth of Massachusetts v. United States, supra.

factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers."

The judgment of the District Court is reversed and the cause is remanded to the District Court with directions to enter judgment in accordance with the views expressed herein.

CHAMBERS, Chief Judge (concurring).

The foregoing opinion is technically excellent and probably interprets correctly the precedents since our case of United States v. King County, 9 Cir., 281 F. 686.

If this were a court that could decide what the law ought to be, I would dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Endorsed
Filed
SEP 26 1962
Frank H. Schmid,
Clerk

UNITED STATES OF AMERICA, *Appellant*, v. WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a WASHINGTON STATE FERRIES, *Appellee.*	No. 17379 ORDERS

ORDERS ON "ALTERNATIVE MOTION OF APPELLEE FOR ORDER TO REMAND FOR FURTHFR PROCEEDINGS, TO CLARIFY MANDATE, AND FOR OTHER INTERIM RELIEF" AND ON APPELLEE'S "PETITION FOR REHEARING."

Before: CHAMBERS, BARNES, HAMLEY, HAMLIN, JERTBERG, MERRILL, KOELSCH, BROWNING and DUNIWAY, Circuit Judges.

1. The alternative motion of appellee "for order to remand for further proceedings, to clarity mandate, and for other interim relief" is denied;.

2. The petition of appellee for rehearing is denied.

Gilbert H. Jertberg
Circuit Judge

APPENDIX C
(190 F Supp. 95)

UNITED STATES OF AMERICA, Plaintiff,

v.

WASHINGTON TOLL BRIDGE AUTHORITY, dba Washington State Ferries, Defendant.

No. 2243.

United States District Court
W. D. Washington, S. D.
Dec. 14, 1960.

Charles P. Moriarty, U. S. Atty., Seattle, Wash., and Charles W. Billinghurst, Asst. U. S. Atty., Tacoma, Wash., for plaintiff.

John J. O'Connell, Atty. Gen., Jennings P. Felix, Special Asst. Atty. Gen., for defendant.

BOLDT, District Judge.

The basic question presented in this case is whether under the agreed facts defendant Authority and the users of its ferry services are exempt from the federal taxes imposed by 26 U.S.C. § 4261 (transportation of persons) and § 4271 (transportation of property). Recovery upon assessments against the Authority based on its passenger and freight ferry traffic from January 10, 1957 to September 30, 1957 is the immediate objective of the action. Jurisdiction is vested in this court by 26 U.S.C. § 7402.

The Washington State Toll Bridge Authority was established by statute as a state agency in 1937.

RCW 47.56.020. In 1949 the state legislature empowered the Authority to acquire and operate a system of ferries on and across Puget Sound and its tributary waters. RCW 47.60.010. Pursuant thereto the Authority purchased vessels, terminals, routes and other property from various private concerns in the business of operating ferries. The Authority presently operates about 23 vessels on various routes throughout the Puget Sound and into Canadian waters. This water transportation system is probably the largest of its kind in the United States.

The Authority commenced transportation services in June, 1951, and from then until April 1, 1952 it collected and paid under protest federal transportation taxes, as required by a ruling of the Commissioner of Internal Revenue. When the federal government sought to collect transportation taxes and penalties for the period April 19, 1952 to December 30, 1954, extended negotiations concerning the matter were undertaken between the parties. An arrangement resulted whereby the Authority agreed to resume collection from patrons of amounts equal to the transportation taxes and to deposit such amounts in escrow pending judicial determination of the applicability of the above cited tax statutes to the ferry operations of the Authority. The Commissioner agreed to promptly initiate litigation to that end and all back tax claims against the Authority were compromised for $75,000. On January 10, 1957 the Authority began to place in escrow an

amount equal to the tax the government contended was due and taxable. The Commissioner then authorized the commencement of this action for the collection of taxes assessed for the first three quarters of 1957 and for application thereto of the funds in escrow.

[1] Defendant contends that the only procedure maintainable for adjudication of the law issue referred to is under 26 U.S.C. § 6672 which provides for the imposition and collection of a 100% penalty where a party obligated to collect a tax wilfully fails or refuses to do so. Recovery of penalties admittedly is not sought in this action and for that reason defendant urges that dismissal is required.

[2] The agreement of the parties, arrived at in a good faith effort to provide for adjudication of disputed questions of law, makes it clear that the parties intended to avoid a penalty proceeding wherein wilfulness is an essential element. "Wilfully" as used in section 6672 has been defined as "without reasonable cause" or "capriciously." See Kellems v. United States, D.C.D. Conn. 1951, 97 F. Supp. 681. Procedure as in the action now before the court was contemplated by the parties' agreement. In these particular circumstances, plaintiff properly followed the necessary procedural requirements in the bringing of this action for collection of the assessed excise transportation taxes out of the escrow fund and defendant may not challenge that procedure which raises the basic issue of the

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applicability of the cited tax statutes to the ferry operations of defendant.

[3] On the merits of the basic issue, defendant contends that the ferry operations of the Authority are immune from federal taxation because in essence they are an integral and necessary part of the state highway system, the providing of which has been long recognized as a state governmental function. Plaintiff contends that in taking over an extensive ferry system, previously operated as a private business over a period of many years, the Authority entered into a proprietary activity which is not entitled to the state's immunity from taxation.

[4, 5] It is well settled that the maintenance of a highway system, including necessary bridges, by a state government or a subdivision thereof, is an exercise of a traditional and essential governmental function. Commissioner of Internal Revenue v. Harlan, 9 Cir., 1935, 80 F. 2d 660, and State ex rel. Wash. Navigation Co. v. Pierce County, 1935, 184 Wash. 414, 51 P. 2d 407. Where a ferry serves as an essential link in a highway, clearly it is as much an integral part of the highway system as a bridge. United States v. State Road Dept. of the State of Florida, 5 Cir., 1958, 255 F. 2d 516; United States v. King County, Wash., 9 Cir., 1922, 281 F. 686.

[6] While the taxes in question are imposed on users and merely collected by carriers, when the transportation service is performed by a state agency in exercise of an essential governmental func-

tion a federal tax on the service is an unlawful interference with and burden upon the state function. United States v. King County, Wash., supra.

The considerable size and extent of the Puget Sound ferry system, in and of itself, does not change the basic nature of the service and function performed by the ferries operated in the system. By means of the ferries the Authority provides in effect a public highway across water, fulfilling public transportation requirements dictated by the geography of the area. The irregular shoreline of the inland waters of Puget Sound separates large areas of land and important centers of population within the state of Washington. An extensive ferry system is the only practical means of providing convenient public transportation connecting many highway terminals and permitting the passage of persons and property between numerous cities and towns of the state. Without such water transportation the public, in normal and essential communication, would be put to extensive additional land travel to reach many places within the state and residents of a considerable number of populated islands would have no public means of access to other areas of the state. The highway transportation needs of the people of Washington and reasonable social and economic development of the state fully justify the nature and extent of the ferry system provided by the defendant Authority.

[7, 8] The fact that substantial parts of the ferry system were previously operated as a private business does not change the basic nature of the governmental function involved. Since early times the establishment of ferries across streams and on navigable waters, for normal transportation purposes as distinguished from sightseeing, amusement and the like, has not been considered a matter of purely private right and function. It has long been deemed a public function permitted only by the consent, express or implied, of sovereign authority. See 22 Am. Jur., Ferries § 3, p. 554. A true governmental function remains so whether performed directly by the sovereign or by a private concern under permission and control of the sovereign.

[9] As contended by plaintiff, the trend of modern case authority has been to confirm, and perhaps extend, the power of congress to tax many activities in which a state may engage. State of South Carolina v. United States, 1905, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261; State of Ohio v. Helvering, 1934, 292 U. S. 360, 54 S. Ct. 725, 78 L. Ed. 1307; Helvering v. Powers, 1934, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291; Helvering v. Gerhardt, 1938, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427; Allen v. Regents, 1938, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448; State of New York v. United States, 1946, 326 U. S. 572, 66 S. Ct. 310, 90 L. Ed. 326. See also United States v. State of California, 1936, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567. How-

ever, all of the cited cases directly or by implication acknowledge that there are activities in which a state may perform its traditional governmental functions immune from federal taxation. Under the particular circumstances and peculiar geographic conditions under which its services are performed, the operation of the Puget Sound Ferry system by defendant Authority is such a governmental activity of the state of Washington. In the performance of such functions the state and its agencies are immune from federal taxation, including transportation taxes provided for in 26 U.S.C. §§ 4261 et seq. and 4271 et seq.

Findings of fact, conclusions of law and judgment in accordance herewith may be presented at the convenience of counsel.

APPENDIX D
(281 F 686)

UNITED STATES v. KING COUNTY, WASH., et al.

(Circuit Court of Appeals, Ninth Circuit.
July 3, 1922.)

No. 3790.

In Error to the District Court of the United States, for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the United States against King County, Wash., a municipal corporation, and others. Judgment for defendants, and the United States brings error. Affirmed.

Thomas P. Revelle, U. S. Atty., and John A. Frater, Asst. U. S. Atty., both of Seattle, Wash. (Carl A. Mapes, Sol. of Internal Revenue, of Washington, D. C., and Robert M. Foster, Sp. Atty., Bureau of Internal Revenue, of counsel), for the United States.

Malcolm Douglas and Howard A. Hanson, both of Seattle, Wash., and L. L. Thompson, Atty. Gen. of Washington, for defendants in error.

Before ROSS, MORROW, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The court below having sustained a demurrer to the complaint as amended and given judgment accordingly, the sole question

here is as to the sufficiency of the plaintiff in error's pleading. The action was brought to recover of King county, state of Washington, and its officers, a transportation tax on account of moneys paid to them for the transportation of freight and passengers on certain ferryboats maintained and operated by the county.

A statute of the state of Washington authorized any county within the state to, among other things—

> "operate and maintain a ferry across or wharf at any unfordable stream, lake, estuary or bay within or bordering on said county, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority to operate and maintain the same free or for toll, by and under the direction and control of the board of county commissioners of such county and as said board shall by resolution determine." Laws Wash. 1895, p. 341, § 2; Laws Wash. 1899, p. 39, § 1; Remington's Code Wash. 1915, § 5013.

By section 500 of the United States Revenue Act of 1917 (40 Stat. 314) it was, among other things, provided that from and after November 1, 1917, there should be—

> "levied, assessed, collected, and paid a tax equivalent to three per centum of the amount paid for the transportation by rail or water * * * when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another,

> * * * and a tax equivalent to eight per centum of the amount paid for the transportation of persons by rail or water * * * on a regular established line when in competition with carriers by rail or water from one point in the United States to another, or to any point in Canada or Mexico, where the ticket therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 35 cents, and a tax equivalent to ten per centum of the amount paid for seats, berths and staterooms * * * on vessels. * * *"

The next section provided that the taxes imposed by section 500 should be paid by the person, corporation, partnership, or association paying for the services or facilities rendered. A similar requirement is made by section 501(a) of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6309⅓b). By section 503 it is provided, among other things, that every person, corporation, partnership, or association, receiving any payments referred to in section 500, should collect the amount of the tax so imposed and should make monthly returns under oath in duplicate and pay the same to the collector of internal revenue of the district in which the principal office or place of business is located. By section 500 et seq. of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6309⅓a et seq.) the rates levied, assessed, and to be collected and paid after April 1, 1919, were increased, but with similar provisions

in other respects, in so far as concerns the present case, as specified in the act of 1917.

Two contentions are made on behalf of the plaintiff in error: First, that the maintenance and operation of the ferries by the municipality was and is an ordinary business enterprise, as distinguished from a strictly governmental function, which latter (it is practically conceded) is protected by the federal Constitution against taxation; and, secondly, that if it be conceded that the maintenance and operation of the ferry in question is a purely governmental function, engaged in by the municipality and its officers for the benefit of the public at large, still the tax involved is imposed, not upon the state instrumentalities, but upon the persons paying for the transportation services, and that the state authorities could be legally required to collect the moneys for such transportation and pay the tax over to the United States.

We do not understand that the establishment and operation of a ferry by any governmental body can be properly regarded as a business enterprise, nor that there is or can be anything private about it. We understand it to be the duty of the government, whether national, state, county, or city, to provide suitable roads, bridges, and ferries for the convenience of the public, and that when such a government undertakes to do so, and to itself operate them, it is in the exercise of a strictly governmental function, and that the public have the right to the

use thereof upon complying with the terms and conditions legally prescribed. It has always been so, as we understand the law. In the case of Hart v. Bridgeport, 11 Fed. Cas. 681, No. 6,149, 13 Blatchf. 289, Judge Shipman, in speaking of the line of demarcation between public governmental duties and private or corporate duties, said at page 682:

> "Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised, either by the state or the corporation, for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health, and the prevention of nuisances. The execution of these duties is undertaken by the government, because there is a universal obligation resting upon the government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of intercommunication are benefits in which the whole community is alike and equally interested. Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation

of particular classes of business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit."

That it is a principle of the common law that ferries are publici juris, and can be granted by the sovereign power, see Conway et al. v. Taylor's Executor, 66 U. S. (1 Black) 603, 17 L. Ed. 191; Fanning v. Gregoire et al., 57 U. S. (16 How.) 524, 14 L. Ed. 1043; Mills v. St. Clair Co. Com'rs, 3 Scam. (Ill.) 53; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884. In McQuillin on Municipal Corporations, vol. 1, § 227, p. 514, it is said:

"The use of streets is designed for the public at large, as distinguished from the legal entity known as the city, or municipal corporation. The management of highways may be characterized as municipal duties relating to governmental affairs. During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. In this country control of highways is primarily a state duty. They are everywhere maintained for the use of the public at large. 'To the commonwealth here, as to the king of England, belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals,

or public roads laid out by authority of the quarter sessions. In England a public road is called the king's highway, and, though it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority.' "

At page 893, § 406, the same author says:

"A ferry may be regarded as the continuation of a public highway from one side of the water over which it passes to the other. In this sense it is a substitute for a bridge, and its end and use is the same. A ferry is a right or franchise which cannot be exercised in England without the king's license, and in this country it cannot be exercised without a legislative grant. In law it is treated as a franchise. It does not belong to the riparian proprietor of the soil. The state may authorize a municipal corporation to establish and license ferries."

To the same effect are the decisions in the cases of East Hartford v. Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518; People v. S. F. & A. R. Co., 35 Cal. 606; City of New York v. Starin, 106 N. Y. 1, 12 N. E. 631; Hackett v. Wilson, 12 Or. 25, 6 Pac. 652; Reid v. Lincoln County, 46 Mont. 41, 125 Pac. 429; Patterson v. Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

The South Carolina case (199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737), referred to by counsel on both sides, involved an excise tax levied by the general government on the sale of intoxicating liquor by agents designated by the state

for its disposal, and the court—three justices dissenting—held that the business so entered upon and conducted by the state was of a private business nature, and therefore not exempt from an excise tax. But that, in our opinion, was a wholly different case from the present one. The prevailing opinion did not undertake to overrule any of the numerous preceding decisions of the same court upon the general subject, but to distinguish them. One of the preceding cases was that of Ambrosini v. United States, 187 U. S. 1, 23 Sup. Ct. 1, 47 L. Ed. 49. In that case what was called the Dramshop Act of the Legislature of Illinois, passed for the purpose of regulating the liquor traffic in protection of the public, and certain ordinances of the city of Chicago enacted thereunder, required bonds to be given by applicants as prerequisites to the issue of licenses permitting sales. The court held that the granting of such licenses was a strictly governmental function, and that the giving of the bonds was a part of the same transaction, and to tax either would be to impair the efficiency of the state and municipal action, and therefore was unconstitutional.

In United States v. Baltimore & Ohio R. Co., 17 Wall. 322, 21 L. Ed. 597, the Supreme Court held that the United States could not tax revenues received by a municipal corporation of the state of Maryland from funds invested by it in stock of a railroad company, for the reason that such investment was made by the city in its governmental ca-

pacity for the general benefit of its citizens. So, in the instant case, it seems clear to us that the establishment and operation of the ferry in question by the county of King under legislative grant of power for the benefit of the public was in pursuance of its strictly governmental function.

It is true that in the present case the tax was not imposed directly upon the county of King, but upon the persons paying to it the transportation charges; but it is obvious that the collection of those charges is at least one of the means which the county must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state.

The judgment is affirmed.

APPENDIX E

FEDERAL STATUTES

INTERNAL REVENUE CODE—26 USC

§ 4261. Imposition of tax

(a) Amounts paid within the United States.—There is hereby imposed upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water, or air within or without the United States a tax equal to 10 percent of the amount so paid.

* * *

(d) By whom paid.—The taxes imposed by this section shall be paid by the person making the payment subject to the tax.

§ 4264. Special rules

(c) Payment of tax.—Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, under regulations prescribed by the Secretary or his delegate, to the extent that such tax is not collected under any other provision of this subchapter—

(1) Such tax shall be paid by the person paying for the transportation or by the person using the transportation;

* * *

§ 4271. Imposition of tax

(a) Property other than coal.—There is hereby imposed upon the amount paid within or without the

United States for the transportation of property, except coal, by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 percent of the amount so paid.

* * *

(d) By whom paid.—The taxes imposed by this section shall be paid by the person making the payment subject to the tax.

§ 4272. Exemptions

(a) Not in business for hire.—The tax imposed under section 4271 shall apply only to amounts paid to a person *engaged in the business of transporting property for hire,* including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under such section. (Emphasis supplied.)

§ 6203. Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment.

§ 6651. Failure to file tax return

(a) Addition to the tax.—In case of failure to file any return required under authority of subchap-

ter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

§ 6671. Rules for application of assessable penalties

(a) Penalty assessed as tax.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.—The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or mem-

ber is under a duty to perform the act in respect of which the violation occurs.

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a WASHINGTON STATE FERRIES, *Appellee.*	No. 17379

ALTERNATIVE MOTION OF APPELLEE FOR ORDER TO REMAND FOR FURTHER PROCEEDINGS, TO CLARIFY MANDATE, AND FOR OTHER INTERIM RELIEF

COMES NOW the Washington Toll Bridge Authority, d/b/a Washington State Ferries, Appellee, and respectfully makes this Motion for an order providing:

1. That the opinion of this Court in this cause dated July 31, 1962, be withdrawn pending entry of further Findings of Fact and Conclusions of Law by the trial court as to whether or not the increment in tolls charged by the Washington State Toll Bridge Authority for the use of the facilities of the Washington Ferry System has imposed a direct and substantial financial burden upon the State of Washington.

2. That this cause be remanded to the United States District Court for the Western District of

Washington, Southern Division, for such further proceedings as are necessary to make and enter such additional Findings of Fact and Conclusions of Law, with directions to the trial court to certify its additional Findings to this Court as soon as practicable.

3. That this Court make provisions for reconsideration of the Opinion in this cause dated July 31, 1962, in the light of such additional Findings of Fact and Conclusions of Law as may be certified to this Court pursuant to the Appellee's Petition for Rehearing on file herein.

4. Appellee further requests that if the Appellee's Petition for Rehearing is denied, the order of the court denying the petition clarify the court's mandate in each of the foregoing particulars so as to indicate:

(a) If the trial court finds that application of 26 USC 4261 to Appellee's activities does result in a direct and substantial interference with Appellee's governmental function, is the statute unconstitutional?

(b) In any event, are the assessments issued by Appellant against the Appellee upon which this action is based valid or invalid?

5. In any event, and if Appellee's Petition for Rehearing is denied before hearing of this Motion, then Appellee respectfully requests this Court to stay the mandate indicated by the Court's Opinion

of July 31, 1962, until after hearing of this Motion, and that provision be made for such hearing.

STATEMENT OF POINTS AND AUTHORITY IN SUPPORT OF THIS MOTION

This Motion is based upon affidavits of R. Gilman Smith, Consulting Traffic Engineer, Darrell Hedges and M. O. Martin, attached hereto, and the following Authority:

I

The procedure requested by this Motion lies within the inherent and sound discretion of this Court, as specified by 28 USC 2106, providing:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, *or require such further proceedings to be had as may be just under the circumstances.* June 25, 1948, c. 646, 62 Stat. 963." (Emphasis supplied.)

II

This Court's Opinion of July 31, 1962, indicates that the record does not disclose the extent of the interference with the Appellee's governmental function of maintaining toll facilities within the public highway system of Washington which the federal law in question works upon the State of

Washington. The evidence required to meet the test thus propounded by this Court was not material, according to *United States v. King County* (9th Cir., 1922) 281 Fed. 686, which this Court specifically overruled. In overruling *King County*, this Court made the question of the extent of interference of the tax in question a pivotal and ultimate question of fact, for the first time in the history of the statute in question. This Court thus declared:

> "Attention must be focused on the specific activity and the nature and extent of interference with or burden upon the state, and this burden must be actual and substantial and not the creature of speculation and conjecture." (Id., p. 6)

III

The evidence which is available to meet the test found to be the pivotal question in this Court's Opinion is outlined in the supporting affidavits of R. Gilman Smith, Darrell Hedges and M. O. Martin. The supporting affidavits indicate, and Appellee further respectfully declares, that it can prove that the interference and burden upon Appellee's governmental function which result from the Act as construed and applied in the Court's Opinion of July 31, 1962, is direct and substantial; that the tax is *not* absorbed by the persons using the system; and that the tax *does* impose an undue economic burden on the state. The foregoing evidence will specifically disprove the contrary assumptions made by this Court in its Opinion (Id., p. 7) that:

"* * *, such collections have not unduly interfered with, or placed a burden upon the state's function of government and because the tax is absorbed by the persons using the Ferry system, it imposes no undue economic burden upon the State of Washington." (Opinion, id., 7)

IV

The lower court did not consider and could not have considered evidence which would prove the nature and extent of the interference with the governmental operations of the State of Washington which resulted or would result from the increment in tolls charged for use of the facilities in question, because (1) such evidence was not then material in view of this Court's long-standing decision in *United States v. King County*; (2) since 1957 and since the time of entry of the pre-trial order by the court below and entry of the trial court's judgment, the Appellee has been afflicted with severe financial problems requiring direct monetary subsidization from public revenues other than tolls in the amount of $9,307,718.91. In addition, much indirect financial support is given the System by state government in order to fulfill its governmental obligation to maintain the highway system.

V

Accordingly, the failure to introduce evidence pertinent to the issue of impairment of the Appellee's governmental operations is not due to the neglect

of Appellee. On the contrary, the record here clearly indicates that in order for justice to be done, Appellee should be afforded the judicial opportunity to demonstrate the facts in support of this contention now made pivotal as a result of this Court's opinion overruling United States v. King County, if the Court will not take judicial notice of such facts as requested in Appellee's Petition for Rehearing.

CERTIFICATE

Counsel hereby certifies that this Motion is made in good faith and on grounds believed to be meritorious and is not offered to embarrass, hinder or delay the parties or the Court. Additional grounds and argument in support of this Motion are set forth in Appellee's Petition for Rehearing simultaneously filed herewith.

WHEREFORE, Appellee respectfully moves for an order of this Court in the particulars indicated above.

DATED this 28th day of August, 1962.

JOHN W. RILEY,
Special Assistant Attorney General
535 Central Bldg., Seattle, Washington

Counsel for Appellee Washington State Toll Bridge Authority and Washington State Ferries, a division thereof.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

WASHINGTON TOLL BRIDGE AUTHORITY,
d/b/a WASHINGTON STATE FERRIES,
Appellee.

No. 17379

AFFIDAVIT OF MR. DARRELL HEDGES, EXECUTIVE SECRETARY OF THE WASHINGTON STATE TOLL BRIDGE AUTHORITY, IN SUPPORT OF THE MOTION OF APPELLEE FOR AN ORDER TO REMAND AND OTHER RELIEF AND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

UNITED STATES OF AMERICA
STATE OF WASHINGTON } ss.
County of Thurston

DARRELL HEDGES, being first duly sworn, on oath deposes and says:

I am Darrell Hedges, executive secretary of the Washington State Toll Bridge Authority. I make this affidavit in support of the Appellee's Motion for an order to remand and other relief and in support of the Appellee's Petition for Rehearing.

I have served as the executive secretary of the Washington State Toll Bridge Authority since May, 1954. In this capacity I have the responsibility for carrying out the policies of the Washington Toll

Bridge Authority and accordingly have and have had complete cognizance of the entire financial affairs of Washington State Ferries since 1954.

The Washington State Toll Bridge Authority is the parent state agency of the Washington State Ferry System. The facilities of the Washington State Ferry System are operated in coordination with other facilities established and maintained by the Washington Toll Bridge Authority. All these facilities are operated under the supervision of the Department of Highways. Each facility of the State Toll Bridge Authority is maintained and operated as an integral link in the public highway system of this state. Employees of Washington State Ferries are employees of Washington State and enjoy membership in the State Employees' Retirement System.

The entire operations of the Washington State Toll Bridge Authority and Washington State Ferries are dependent upon revenue bond financing. To retire these bond issues the Appellee has depended primarily upon revenues from tolls paid by its patrons. All of the bond issues in the history of the system provide that if revenue from the bonds is insufficient to meet debt service requirements, then increments in tolls to develop revenue sufficient to meet debt service requirements are required unless other tax funds are made available to augment revenue.

Since 1957 grants and appropriations of general public revenues have been necessary to enable the Ferry System to meet normal debt service re-

quirements as an alternative to increments in tolls which would have discouraged traffic, thereby impairing Appellee's ability to carry out its statutory function of development and maintenance of a public highway system which is adequate to meet the normal communications requirements of the citizens of the State of Washington. The nature and extent of these funds is described in the affidavit of M. O. Martin, the Controller and fiscal officer of Washington State Ferries.

DARRELL HEDGES.

SUBSCRIBED AND SWORN to before me this 28th day of August, 1962.

V. B. OTIS,
Notary Public in and for the State of Washington, residing at Olympia.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a WASHINGTON STATE FERRIES, *Appellee.*	No. 17379

AFFIDAVIT OF MR. R. GILMAN SMITH, CONSULTING TRAFFIC ENGINEER OF THE WASHINGTON STATE TOLL BRIDGE AUTHORITY, IN SUPPORT OF THE MOTION OF APPELLEE FOR AN ORDER TO REMAND AND OTHER RELIEF AND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

UNITED STATES OF AMERICA
State of New York } ss.
County of .....

R. GILMAN SMITH, being first duly sworn, deposes and says:

I am R. Gilman Smith, a member of the firm of W. C. Gilman & Company, Room 1115 at 115 Broadway, New York 6, New York. I make this affidavit in support of the motion of Appellee for an order to remand and other relief and in support of Appellee's Petition for Rehearing.

Since 1947 my firm has been retained by the State of Washington, Toll Bridge Authority, for various financial feasibility studies and since 1951

by Washington State Ferries as Independent Engineer for work including Financial Feasibility Studies, Estimation of Revenue and Tariff Predictions and other matters as specified in various bond resolutions.

I am a professional engineer specializing in the practice of traffic engineering including the estimate of traffic volumes for transit services including transit, ferry services, toll bridges and other toll facilities; financial feasibility estimates for rapid transit projects, toll bridges, ferry services, port facilities and parking projects; general traffic studies for urban and metropolitan areas including parking; coordinated transportation involving highways and transit; operational transit studies including fare structures, fare collection procedures, routing and service requirements, maintenance procedures and costs and related matters; valuation of transit properties; participation in matters before regulatory authorities; etc. I graduated from the University of Wisconsin in 1915, receiving a Bachelor of Science degree in Mechanical Engineering. From 1915 to 1916 I participated in postgraduate work in engineering at the Massachusetts Institute of Technology. I am a licensed professional engineer in the State of New York and a member of the Institute of Traffic Engineers.

In eighteen years as a partner in the W. C. Gilman & Company my work has been primarily in the transportation field. This has included local

and metropolitan area transit (street cars, trolley coaches, motor buses and various forms of rapid transit), ferry service, toll bridges, port facilities, small boat marinas and other facilities for which the financial feasibility is dependent on the volume of use by the public and the payment by such users of specified tolls, fares or other charges dependent on the extent and character of such use. I have supervised and also actively participated in all of this type of work carried on by W. C. Gilman & Company in this eighteen year period.

Specifically these assignments have included the following:

A. Preparation of estimates of the net productivity of upward adjustments in transit rates of fare (after allowance for losses in riding volume due to such fare increases) and submission of such estimates to regulatory authorities, including testimony in connection therewith for:
   - Milwaukee & Suburban Transport Corp.
   - Twin City Rapid Transit Company (Minneapolis-St. Paul)
   - Capital Transit Co. (Washington, D. C.)
   - Louisville Transit Co.
   - Surface Transportation Co. (New York City)
   - The Connecticut Company (Hartford & New Haven, Conn.)

B. Preparation of estimates of the net productivity of toll rate increases made by Washington State Ferries at various times

since the acquisition of the ferry system by the State of Washington in 1951.

C. Preparation of studies as to the financial feasibility of various projects based on estimated volume of use at specified rates of tolls or charges as established by us:

Tacoma Narrows Bridge

Fox Island Bridge (Pierce County, Washington)

Hood Canal Bridge (State of Washington)

Proposed bridge connecting Lopez and San Juan Islands (San Juan County, Washington)

Proposed bridge connecting Bainbridge Island with the Kitsap Peninsula near Bremerton (Washington).

Purchase of the ferry system of Puget Sound Navigation Co. by the State of Washington

Establishment of passenger and vehicle ferry service between Horseshoe Bay (Vancouver, B. C.) and Departure Bay on Vancouver Island

Establishment of an all purpose (passenger and vehicle) ferry service by the State of Alaska connecting Prince Rupert, B. C., with Skagway, Alaska, via Ketchikan, Wrangell, Petersburg, Juneau and Haines

Proposed bridge across the Fraser River at Agassiz (British Columbia)

Harbor improvements in Honolulu harbor

Small boat marina at Edmonds, Washington

Purchase of a new ferry by the Bridgeport (Conn.) and Port Jefferson Steamboat Company

Proposed passenger and vehicle ferry service between Freeport (Grand Bahama Island) and Miami, Florida

An internal passenger transportation facility to take persons to the top of the 600 foot Jefferson Memorial Arch now under construction in St. Louis

A proposed monorail rapid transit line along or immediately adjacent to Wilshire Boulevard in Los Angeles

A proposed monorail rapid transit line between Tel Aviv and Petach-Tikva, Israel.

I am now and have been since 1951 personally familiar with the financial condition of the Washington State Ferry System. It is a well known fact, of which there is no doubt, that the Washington State Ferry System is now and has been for several years last past in dire financial straits. The financial difficulty of the Washington Ferry System has required emergency disbursements by the Governor of the State of Washington from the Governor's Emergency Fund and other appropriations from general revenue by the legislature of the State of Washington.

In considering the financial feasibility of toll road, toll bridge, railroad, municipal transit, and maritime transit projects, it is a notorious fact and rule of definite predictability, accepted by traffic consultants everywhere that the higher the total

consideration required for use of a given facility, then the greater is the discouragement of use by patrons and potential patrons of those facilities.

In other words, every increase in tolls required for use of a toll bridge, a toll ferry or other transportation facility, even though modest in amount, will produce a decrease in volume of traffic over such a facility, with corresponding impairment of the financial ability of the facility or organization in question.

In my opinion the gradual increment in tolls required to maintain the operations of the Washington State Ferries over the years has been a substantial contributing factor in the curtailment of rate growth or actual reductions in the traffic flowing over the same facilities, which factor has directly and substantially contributed to the impairment of the financial ability of the Washington State Ferry System to meet its obligations, thereby necessitating financial subsidies from public funds other than toll revenue.

Specifically, it is my opinion that the increment in tolls occasioned by the increase in 1957 in amounts equal to the Federal Transportation Tax directly and substantially contributed to the subsequent impairment of the financial ability of the Washington State Ferry System to meet its obligations, directly necessitating substantial subsidies from general tax revenues of the State of Washington.

Your affiant further certifies that, if called upon, he would testify in support of the Appellee in the foregoing particulars and would assist the Appellee to present other evidence which would prove or tend to prove the foregoing contentions of your affiant.

R. GILMAN SMITH.

SUBSCRIBED AND SWORN to before me this 24th day of August, 1962.

PETER JAMES MCTAGUE,
Notary Public in and for the State of New York, residing at Queens County.

My commission expires March 30, 1963.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

WASHINGTON TOLL BRIDGE AUTHORITY,
d/b/a WASHINGTON STATE FERRIES,
Appellee.

No. 17379

AFFIDAVIT OF MELVIN O. MARTIN, CONTROLLER AND FISCAL OFFICER OF THE WASHINGTON STATE TOLL BRIDGE AUTHORITY, IN SUPPORT OF THE MOTION OF APPELLEE FOR AN ORDER TO REMAND AND OTHER RELIEF AND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

UNITED STATES OF AMERICA
STATE OF WASHINGTON
County of King
} ss.

MELVIN O. MARTIN, being first duly sworn, on oath deposes and says:

I am Melvin O. Martin, Controller and Fiscal Officer of the Washington States Ferries, a division of the Washington State Toll Bridge Authority. I make this affidavit in support of the Appellee's Motion for an Order to Remand and other relief and in support of the Appellee's Petition for Rehearing in the above entitled cause.

I have served as the Controller and Fiscal Officer of the Washington State Ferries, a division of

the Washington State Toll Bridge Authority, since 1951. My responsibilities include supervision of all matters related to collection, disbursement and accounting of any and all funds of the Washington State Ferries, preparation of financial statements and reports, payrolls and other statistical data. All the financial records and accounts of the Washington State Ferries have been subject to my control and supervision since 1951.

The entire operation of the Washington State Ferries division of the Washington State Toll Bridge Authority is dependent upon revenue bond financing. To retire these bond issues, the Appellee depends upon revenues from tolls paid by its patrons. All of the bond issues in the history of the system provide that if net revenue from operations is insufficient to meet debt service requirements, then increases in tolls to develop net revenue sufficient to meet debt service requirements are required unless other funds are made available to augment net revenue.

Since 1957 grants and appropriations of general public revenues have been necessary to enable Washington State Ferries to meet its financial obligations without increasing tolls.

Since 1957 $9,307,718.91 has been paid by the Washington Legislature and from the Governor's Emergency Fund to the Washington State Ferries for expenses incurred in the operation of the State Ferry System.

Of the foregoing amount, $640,956.10 represents the payment of funds for the benefit of the Washington State Ferries during the 1957-1959 biennium pursuant to Chapter 271, Laws of 1957 of the State of Washington. This amount was derived from gasoline taxes paid into the Puget Sound Transportation Stabilization Fund created by Chapter 271 of the Laws of 1957 by an appropriation from the Legislature of $750,000.00. This same law provided that three-fourths of one per cent of the net tax amount of the motor vehicle fund was to be paid monthly as the same accrued. A total of $640,956.10 was thus credited to this fund during the 1957-1959 biennium. Of this amount, $512,522.95 was spent in the form of contributions of Washington State Ferries to the State Employees Retirement Fund, a normal payroll cost of Washington State Ferries at six per cent of the applicable wages from the payroll of Washington State Ferries. The remaining $128,-433.15 was spent in the form of contributions of Washington State Ferries to the Federal Internal Revenue Department, a normal payroll cost of Washington State Ferries covering employer's tax under the Federal Insurance Contributions Act. The Puget Sound Transportation Stabilization Fund and the amounts expended from it on the account of the Washington State Ferry system were intended for and were in fact utilized for the purpose of avoiding depletion of net revenues from other sources (i.e., tolls) in such a manner as to be unable to meet nor-

mal debt service requirements of outstanding revenue bond issues.

Of the foregoing amount of $9,307,718.91, $439,009.26 represents a payment of funds for and on account of the Washington State Ferry System during the 1959-1961 fiscal biennium pursuant to Chapter 271, Laws of 1957 of the State of Washington, as amended by Chapter 4, Laws of 1959, Ex. Sess., which reduced the appropriation from the Legislature to the Puget Sound Transportation Stabilization Fund to $500,000.00, and provided for contributions to the fund in amounts equivalent to one-half of one per cent of the motor vehicle fund to be paid monthly as the same accrued. This amount of $439,009.26 was expended during the biennium of 1959-1961 for the Ferry System for its State Retirement System costs and was necessary to prevent depletion of net revenues from other sources to a point below that necessary to meet debt service requirements.

Of the foregoing amount of $9,307,718.91, $322,228.06 represents a contribution from the Governor's Emergency Relief Fund during the 1959-1961 fiscal biennium which was necessary to meet debt service requirements. $350,000.00 represents a special motor vehicle fund appropriation by the Washington State Legislature for the 1959-1961 fiscal biennium and was necessary to meet debt service requirements.

$5,500,000.00 represents an interest free appropriation from the Motor Vehicle Fund by the Washington State Legislature to be repaid to the Motor Vehicle Fund from tolls when the 1957 Ferry System bond issue is retired.

$2,055,525.49 represents that portion of a $2,600,000.00 appropriation made by the 1961 Legislature for maintenance, operation and debt service during the 1961-1963 fiscal biennium which has been used as of June 30, 1962.

MELVIN O. MARTIN.

SUBSCRIBED AND SWORN to before me this 27th day of August, 1962.

JOHN W. RILEY,
Notary Public in and for the State of Washington, residing at Olympia.

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No. 679

In the Supreme Court of the United States

OCTOBER TERM, 1962

WASHINGTON TOLL BRIDGE AUTHORITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
JOSEPH KOVNER,
THOMAS A. SMORDIA,
Attorneys,
Department of Justice, Washington 25, D.C.

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WASHINGTON TOLL BRIDGE AUTHORITY, PETITIONER

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. C1–C7; R. 27–32) is reported at 190 F. Supp. 95. The opinion of the court of appeals (Pet. A1–A14; R. 161–170) is reported at 307 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1962. (R. 171.) A petition for rehearing was denied on September 26, 1962. (R. 203.) The petition for certiorari was filed on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the Washington Toll Bridge Authority, in its operation of the Washington State Ferries during the years in which the federal excise tax was applied to water transportation, liable for the collection of such tax on amounts paid by private users of the ferry service for transportation of persons?

2. Was the court of appeals' refusal to remand for the taking of additional evidence a proper exercise of its discretion?

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 4261. IMPOSITION OF TAX.

(a) [as amended by Sec. 1, Act of July 25, 1956, c. 725, 70 Stat. 644] *Amounts Paid Within the United States.*—There is hereby imposed upon the amount paid within the United States for taxable transportation (as defined in section 4262) of any person by rail, motor vehicle, water, or air a tax equal to 10 percent of the amount so paid.

* * * * *

(d) [as amended by Sec. 4(b), Act of July 25, 1956, *supra*] *By Whom Paid.*—Except as provided in section 4264, the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

(26 U.S.C. 4261.)

SEC. 4264 [as amended by Sec. 4(a), Act of July 25, 1956, *supra*]. SPECIAL RULES.

* * * * * *

(c) *Payment of Tax.*—Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, un-

der regulations prescribed by the Secretary or his delegate, to the extent that such tax is not collected under any other provision of this subchapter—

(1) such tax shall be paid by the person paying for the transportation or by the person using the transportation;

* * * * *

(26 U.S.C. Sec. 4264.)

SEC. 4291 [as amended by Sec. 4(c), Act of July 25, 1956, *supra*]. CASES WHERE PERSONS RECEIVING PAYMENT MUST COLLECT TAX.

Except as provided in section 4264(a), every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment. * * *

(26 U.S.C. 4291.)

STATEMENT

The Washington Toll Bridge Authority ("the Authority") is an instrumentality of the State of Washington created by State statute. It exists for the most part as a self-supporting entity with all the rights and liabilities of a common carrier. Since 1951 it has operated an extensive ferry system, the Washington State Ferries, between local and international points, on Puget Sound and its tributaries. (R. 36–37.) The ferry system is necessitated by the geography of the area. It provides a vital link in the State's highway system, carrying passengers and property by water between termini of the State's highways, thereby avoiding circuitous land travel. (R. 37–38.)

The ferry system is an expansion of services formerly provided in part by King County, State of Washington, a municipal corporation and its successor, the King County Ferry District No. 1, and in greater part by the Puget Sound Navigation Company, a private corporation. The ferry properties of both the County and the company were acquired by the Authority. (R. 35-36.)

The ferry system is not a free service. Persons using its facilities for the transportation of persons or property pay tolls or fares which, with profits from concessions, furnish enough revenue to render the system virtually self-supporting.

The United States brought this action in the district court to recover sums owed by the Authority because of its liability for the collection of the federal transportation taxes imposed by Sections 4261, 4264 and 4291, *supra*, pp. 2–3, on amounts paid for the transportation of persons and property by water. (R. 40, 145.) The Authority denied its liability on the ground that the excise taxes were not intended to apply to amounts paid to it, and further on the ground that it enjoyed a constitutional immunity from the duty to collect and remit the taxes. The district court denied recovery. 190 F. Supp. 95. The court of appeals sitting *en banc* reversed in part and affirmed in part. It held that the statute requiring any person engaged in the business of transporting property for hire to collect the tax on amounts paid for such transportation did not by its terms apply to the Authority, because it could not be said to be "in the business." However, the court held that the Authority was liable for the collection of the tax

on amounts paid for the transportation of persons, since the statute did not limit the duty to collect that tax to persons engaged in the business of such transportation, and that the Authority had no constitutional immunity from that duty. (Pet. A1–A14; R. 161–170.)

ARGUMENT

The decision below is correct and there is no conflict among the courts of appeals. The court below did not abuse its discretion in refusing to reopen the case for the taking of further evidence. The case lacks any continuing public importance.

1. The court of appeals' decision denying constitutional immunity to the Authority is grounded in principles long since settled by this Court. The court of appeals reviewed the law and concluded that (Pet. A9–A10):

> * * * it is difficult to understand how the present tax unduly interferes with the State of Washington's function of government. The record is void of any tangible evidence to this effect. The tax involved is made payable by the persons who pay for the transportation while the State's only obligation is to collect the tax. Since the King County case, the States have been forced to accept the role of tax collector for the federal government on numerous occasions, e.g., income and admission taxes. See *Commonwealth of Massachusetts* v. *United States*, 296 F. 2d 336 (1st Cir. 1961). Such collections have not unduly interfered with, or placed a burden upon, the states' function of government. And because the tax is absorbed by the persons using the ferry system, it imposes no undue economic burden upon

> the State of Washington. Any indirect economic consequences incident to such a tax, such as a decrease in the volume of business if the toll is raised or absorption by the State if it is not, are speculative in nature, not "actual or substantial." Here the Authority raised its toll in an amount equal to the tax and there is no claim that this has affected the operation of its ferry system in any manner.

This holding finds its foundation in three similar decisions by this Court. In *Allen* v. *Regents*, 304 U.S. 439, this Court upheld the obligation of the State instrumentality to collect the federal admissions tax on amounts paid for admissions to college football games (304 U.S. at 449–451):

> For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the state government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the state authorities, and their determination is not subject to review by any branch of the federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the state activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a state agency. The petitioner stoutly combats many of these propositions. We have no oc-

> vasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.
>
> * * * * *
>
> When a State embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation.

The approach taken in the above-case was explicitly reaffirmed in *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, upholding the application of the federal admissions tax to admissions fees collected by a State instrumentality for use of a public beach. Thus, the fact that the Authority is a State instrumentality carrying on a governmental function does not dispose of the case. This test has long since been abandoned by the Court. As Mr. Justice Frankfurter, with whom Mr. Justice Rutledge joined, pointed out in *New York* v. *United States*, 326 U.S. 572, 582, 583–584 (which held the State of New York subject to a federal tax imposed on the sale of mineral waters):

> * * * so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. * * *
>
> * * * * *
>
> * * * [We] find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Contrary to the Authority's implication (Pet. 20–21) this view, in fact, received the concurrence of a full majority of the Court. The Chief Justice, in a concurring opinion for himself and three other Justices, stated (326 U.S. at 588–589):

> It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power. *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 524. The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it.[1]

[1] The fact that both opinions specifically rely upon *Ohio* v. *Helvering*, 292 U.S. 360, and indeed, reach a result completely in harmony with it, should put conclusively to rest the Authority's claim that there is required some reconciliation of the two cases. (Pet. 25–27.)

It is thus clear under this Court's precedents that the Authority's acquisition and operation of the property of the Puget Sound Navigation Company did not effect the withdrawal of this enterprise from the federal taxing power. See also *Helvering* v. *Powers*, 293 U.S. 214, 227.

2. The decision below is not in conflict with *United States* v. *State Road Department of Florida*, 255 F. 2d 516 (C.A. 5th), or *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. 2d 920 (C.A. 1st). Neither of these decisions deals directly with the present statute or with facts similar to this case. The *Florida* case held that for the purposes of applying the tax to the transportation of property, the Department of Roads was not "a person engaged in the business of transporting property for hire." 255 F. 2d at 518. The court below accepted this ruling but pointed out that the statute taxing the transportation of persons does not require that the carrying agency be engaged in the business of transportation for hire.[2] The court did—

> not come to the question whether the federal government could constitutionally tax the users of this state-owned ferry * * *.

The case of *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. 2d 920 (C.A. 1st), involves an entirely unrelated statute specifically exempting certain sums from the gross income of otherwise taxable entities.

---

[2] Nor is there anything to the Authority's contention (Pet. 22-23) that it is not a "person" required to collect the tax. Under common rules of construction, the State is a "person" within the meaning of a statute such as the present one. See *Sims* v. *United States*, 359 U.S. 108.

3. The court of appeals properly denied the Authority's petition to reopen the case after the *en banc* judgment in order to offer further evidence of the economic incidence of the excise tax. The validity of federal excise taxes on amounts paid by persons using State services or purchasing goods sold by the States does not depend upon the amount of the tax or its impact upon the fluctuating profitableness of the State's operations. The reference in *New York* v. *United States*, 326 U.S. 572, 588, to a tax which unduly interferes with the performance of the State's function of government goes to the qualitative character of the tax, not to its amount or its competitive consequences. Plainly the court did not abuse its discretion in declining to reopen the case. See *Bowerman* v. *Hamner*, 250 U.S. 504, 514; *Korthinos* v. *The Niarchos*, 184 F. 2d 716, 719 (C.A. 4th), certiorari denied, 341 U.S. 905; *McCarthy* v. *Commissioner*, 139 F. 2d 20, 21 (C.A. 7th).

In any event, the proferred evidence was immaterial. The Authority's application was supported by three affidavits (Pet. F7–F21), one each by Darrell Hedges, executive secretary of the Authority (who had previously been presented as the Authority's key witness at trial), R. Gilman Smith, a professional engineer, and Melvin O. Martin, Controller and Fiscal Officer of the Washington State Ferries. According to the Authority, these affidavits purportedly show a connection between rate of the tolls and the financial feasibility of the Authority's operations. Two of these affidavits, those by Messrs. Hedges and

Martin, are actually silent on that subject, reciting nothing more than the generally unsatisfactory financial condition of the operation without even attempting to show a relation between that condition and the application of the present tax. The third contains precisely the kind of economic speculation and conjecture which had led this Court away from reliance upon the economic incidence of the tax as a legal determinative of constitutionality. See *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 581.

The mere collection of a federal tax from the person paying the fee charged for a governmental service is an unsubstantial burden as a matter of law. *Allen* v. *Regents*, 304 U.S. 439, 452; *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, 419–420. Thus, even assuming all the implications sought to be drawn from the Authority's affidavits in fact existed, they would be immaterial to the resolution of this litigation.

4. The case lacks continuing public importance. The tax upon the transportation of property, which, over our objection, was held inapplicable to the Authority, was repealed as of July 31, 1958, by Section 4 of the Tax Rate Extension Act of 1958, P.L. 85–475, 72 Stat. 259. The tax upon the transportation of persons by water was repealed as of November 15, 1962, by Section 5 of the Tax Rate Extension Act of 1962, P.L. 87–508, 76 Stat. 114.[3]

[3] Investigation by both the Internal Revenue Service and the Tax Division of the Department of Justice discloses that no similar cases are now pending.

CONCLUSION

For the reasons stated, no grounds appear for the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH KOVNER,
THOMAS A. SKORNIA,
Attorneys.

JANUARY 1963.